Fletcher, Heald & Hildreth

1300 NORTH 17th STREET, 11th FLOOR
ARLINGTON, VIRGINIA 22209

OFFICE: (703) 812-0400
FAX: (703) 812-0486
www.fhhlaw.com
www.commlawblog.com

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December 12, 2018

VIA ECFS

Marlene Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***In re Iowa Network Access Division Tariff F.C.C. No. 1***
WC Docket No. 18-60; Transmittal No. 38

Dear Ms. Dortch:

On behalf of Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"), transmitted herewith for filing in the above-referenced proceeding is a copy of the Public version of Aureon's Rebuttal to AT&T Services, Inc.'s Opposition to Aureon's Direct Case. On March 26, 2018, the FCC entered a Protective Order covering confidential materials submitted in this proceeding. Pursuant to the terms of the Protective Order, Aureon has designated certain information in its filing as Confidential, and all confidential information has been redacted in this filing. A Confidential version of the foregoing filing is being submitted contemporaneously via the Secretary's Office as required by the Protective Order.

Should there be any questions with respect to this submission, please contact the undersigned.

Respectfully submitted,

James U. Troup
Tony S. Lee

Counsel for Iowa Network Services, Inc.
d/b/a Aureon Network Services

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	WC Docket No. 18-60
	)	
Iowa Network Access Division Tariff	)	Transmittal No. 38
F.C.C. No. 1	)	

REBUTTAL OF IOWA NETWORK ACCESS DIVISION D/B/A AUREON NETWORK SERVICES

James U. Troup
Tony S. Lee
Fletcher, Heald & Hildreth, PLC
1300 N. 17th Street, Suite 1100
Arlington, VA 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
troup@fhhlaw.com
lee@fhhlaw.com

Counsel for Iowa Network Access Division d/b/a Aureon Network Services

Dated: December 12, 2018

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In the Matter of	)	WC Docket No. 18-60
	)	
Iowa Network Access Division Tariff F.C.C. No. 1	)	Transmittal No. 38
	)	

REBUTTAL OF IOWA NETWORK ACCESS DIVISION D/B/A AUREON NETWORK SERVICES

Iowa Network Access Division d/b/a Aureon Network Services ("Aureon") hereby files its Rebuttal to AT&T's December 6, 2018 Opposition as required by the November 9, 2018 Order Designating Issues for Investigation[1] issued by the Federal Communications Commission ("FCC" or the "Commission").

I. INTRODUCTION

AT&T's Opposition and all of its arguments are premised on one overarching fallacy: that Aureon is a carrier that is subject to FCC rules that only apply to incumbent local exchange carriers ("ILECs"). AT&T does not dispute that the Commission's rules involved in this proceeding do not apply to Aureon because Aureon is not an ILEC. AT&T does not dispute that the Commission's tariff investigation seeks to apply ILEC-only regulations to Aureon set forth in Parts 32 and 36 of the FCC's rules, nor does AT&T dispute that the FCC classified Aureon, for the first time by way of the *Referral Order*, as a competitive local exchange carrier ("CLEC") subject to the FCC's non-dominant CLEC rate benchmark rules in Section 61.26.[2] Indeed, AT&T does not argue in this proceeding that Aureon is an ILEC subject to Parts 32 and 36 of the

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[1] *Iowa Network Access Division Tariff F.C.C. No. 1*, Order Designating Issues for Investigation, WC Docket No. 18-60, Transmittal No. 38, DA 18-1149 (rel. Nov. 9, 2018) ("*Designation Order*").

[2] *AT&T Corp. v. Iowa Network Services, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd. 9677, 9692, ¶ 30 (2017) ("*Referral Order*")).

Commission's rules. Nonetheless, AT&T's Opposition applies the FCC's ILEC-only regulations to Aureon, even though the Commission has ruled that Aureon is not an ILEC, but a CLEC, that is, by Commission rule, subject to less stringent regulatory oversight regarding CLEC access charge rates. Under the Commission's CLEC access charge rules, a CLEC's access charges are presumed just and reasonable as long as such rates are less than the CLEC rate benchmark.[3]

When the FCC first implemented benchmark rates for CLECs, it ruled that it should do so because "a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of 'reasonableness.'"[4] The FCC stated in the *CLEC Access Charge Reform Order* that it was "especially reluctant to impose similar legacy [cost and traffic support] regulation on new competitive carriers . . . . [and that] no CLEC has suggested that [the Commission] adopt such a heavily [sic] regulatory approach to setting their access rates."[5] The Commission made clear that CLECs would not be required to file detailed cost support with their tariffs.[6]

More than 30 years ago, the initial regulatory approval for the construction of Aureon's CEA network held that Aureon was not a LEC.[7] Aureon's past filings have long stated that it is

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[3] *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9936, ¶ 41 (2001) ("*CLEC Access Charge Reform Order*").

[4] *Id.*

[5] *Id.* and n.93.

[6] *Id.*

[7] *In re Iowa Network Access Division*, IUB Docket No. RPU-88-2, 1988 Iowa PUC Lexis 1, slip op. at *10 (Oct. 18, 1988) ("it is appropriate to conclude that the centralized equal access

not an ILEC or a CLEC,[8] and until the *Referral Order*, no FCC decision has ruled that Aureon is a CLEC subject to the CLEC rate benchmark. Indeed, when Aureon submitted its July 1, 2008 Annual Access Charge Tariff filing, AT&T filed a petition to suspend and investigate Aureon's 2008 tariff (Transmittal No. 26) asking the Commission to apply to Aureon the FCC's Part 36 separations *Freeze Order* requiring ILECs to freeze their jurisdictional allocations at 2000 levels.[9] In that filing, AT&T did not allege that Aureon was a CLEC subject to the CLEC rate benchmark that the FCC adopted in 2001 seven years earlier. However, AT&T did ask the Commission to apply Part 36 rules, which are applicable only to ILECs, to Aureon. Verizon also filed a petition to suspend and investigate Aureon's tariff in 2008, and it did not assert that Aureon was a CLEC subject to the CLEC rate benchmark.[10] In its consolidated reply to AT&T and Verizon's petitions, Aureon stated that it was not an ILEC, and because the *Freeze Order* only applied to ILECs, Aureon stated that it was not required to comply with the ILEC-only Part

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services to be provided by INS, even though it is not a local exchange company, are access services").

[8] *See, e.g., Connect America Fund et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Comments of Iowa Network Services, Inc. and South Dakota Network, LLC at 7 (filed Feb. 24, 2012) ("INS and SDN are not ILECs or CLECs and they do not have local retail customers or access to local service revenues or subscriber charges."); *see also* Aureon June 16, 2016 Tariff Filing (filed June 16, 2016), Description and Justification at 1 ("INAD is not an ILEC or a CLEC); Aureon April 14, 2017 Tariff Filing (filed April 14, 2016), Description and Justification at 1 (same).

[9] *In re July 1, 2008 Annual Access Charge Tariff Filings*, AT&T Petition, WCB/Pricing File No. 08-14, at 5 (filed June 26, 2008) (citing *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd. 11392 (2001); *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd. 5516 (2006) (collectively, "*Freeze Order*")).

[10] *See In re July 1, 2008 Annual Access Charge Tariff Filings*, Verizon Petition to Suspend and Investigate Iowa Network Services Inc. F.C.C. Tariff FCC No. 1, Transmittal No. 26, WCB/Pricing File No. 08-14 (filed June 26, 2008).

36 jurisdictional separations rules and freeze.[11] The Commission agreed with Aureon, and allowed its tariff to go into effect.[12]

The FCC's prior history consistently treats Aureon as a dominant carrier required to file cost studies to justify Aureon's centralized equal access ("CEA") service tariff rate, though not as an ILEC required to strictly comply with ILEC-only cost rules. The Commission's recent decision in the 2017 *Referral Order* now classifies Aureon as a CLEC, and Aureon's most recent filing in compliance with the *Tariff Investigation Order*[13] shows that its proposed CEA rate is below the CLEC benchmark rate calculated for the first time by the FCC as $0.005634,[14] and therefore conclusively just and reasonable. AT&T has nonetheless filed yet another Petition against Aureon's CEA tariff filing seeking to regulate Aureon's rates as an ILEC, rather than a CLEC.

The FCC's decision to require that Aureon's CEA tariff rate comply with the newly calculated CLEC benchmark rate, and that Aureon's rate also be justified with cost support even if its rate is below the CLEC benchmark rate of $0.005634, is completely inconsistent with the FCC's ILEC-only rules and its CLEC-only rate benchmark rules, and therefore, arbitrary and

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[11] *In re July 1, 2008 Annual Access Charge Tariff Filings*, Iowa Network Services Consolidated Reply to AT&T and Verizon Petitions, WCB/Pricing File No. 08-14, at 4-5 (filed June 27, 2008).

[12] *In re July 1, 2008 Annual Access Charge Tariff Filings*, Order, 25 FCC Rcd. 10316, 10319, Appendix (2008). Although the FCC listed Aureon's tariff in the Appendix under the heading "2008 Access Filings Made By ILECs," the FCC distinguishes Aureon's tariff from those filed by ILECs in its electronic tariff filing system ("ECFS"), noting that Aureon's tariff is for "Centralized Equal Access in Iowa". The Commission similarly distinguishes South Dakota Network, Inc.'s tariff from ILEC tariffs in the ECFS with the "Centralized Equal Access in SD" designation.

[13] *In re Iowa Network Access Division Tariff F.C.C. No. 1, Transmittal No. 36*, Memorandum Opinion and Order, WC Docket No. 18-60, FCC 18-105 (rel. July 31, 2018) ("*Tariff Investigation Order*").

[14] *Id.* ¶¶ 2, 35 & 43.

capricious. The FCC should not have entertained AT&T's Petition in the first instance in light of the fact that Aureon's proposed CEA tariff rate is below the CLEC benchmark rate calculated by the FCC.

Aureon now files its Rebuttal to AT&T's Opposition. As further shown below, AT&T's Opposition is without merit, and Aureon's proposed CEA rate is fully justified by its cost study, and complies with the ILEC-only Part 32 affiliate transaction rules (even though Aureon is not an ILEC).

II. ARGUMENT

A. Aureon's Circuit Count Information is Accurate for its Most Recent Filing, and Also for its Prior Filings.

1. Aureon's Prior Circuit Inventory System was Accurate, but Limited in its Ability to Reproduce Historical Information.

AT&T argues that Aureon's cost study is unreliable because it uses "flawed" data, and therefore, the Commission cannot rely on any of the data or calculations in Aureon's current and past cost studies. AT&T's assertions are meritless. The circuit inventory that Aureon filed with the FCC, and the information used by Aureon to calculate its CEA rate for its current and past tariff filings, are accurate.

Although Aureon is not an ILEC, its tariff and cost studies use the FCC's ILEC-only rules as guidance in conducting its cost study so that such information is "in a format that is familiar to the Commission in order to facilitate the Commission's review."[15] Aureon constructed its fiber network shortly after it was authorized to provide CEA service in 1988, and the CEA network has grown more complex and has been steadily augmented and changed over

[15] Aureon June 16, 2016 Tariff Filing (filed June 16, 2016), Description and Justification at 1; Aureon April 14, 2017 Tariff Filing (filed April 14, 2017), Description and Justification at 1.

the years as demand and the needs of the interexchange carriers ("IXCs") using Aureon's CEA service have increased over time. When Aureon first offered CEA service to IXCs in the late 1980s, circuits were provisioned on a DS-1 level, and its cost support was filed on that basis as well. Indeed, to this day, Aureon's circuits continue to be provisioned on a DS-1 basis due to this original legacy infrastructure.[16]

Prior to its most recent Tariff Transmittal No. 38, Aureon had conducted its cost studies on a DS-1, rather than a DS-3 basis. The requirement for Aureon to calculate its CEA rate using DS-3s rather than DS-1s is a new condition that, prior to the FCC's *Tariff Investigation Order*, had never before been required of Aureon's cost studies. When Aureon filed its initial Tariff F.C.C. No. 1 on August 10, 1988, Aureon performed its cost studies using the FCC's ILEC cost rules as guidance, just as it has done for all subsequent tariff filings, and using DS-1 circuits as the basis for its cost allocations because that was the circuit type used to provide service to IXCs to route their traffic to rural LECs.[17] Various IXCs, including AT&T, filed petitions to reject or suspend Aureon's tariff because Aureon allegedly based its proposed rate on inadequate cost support.[18] After filing several revisions to its tariff to clarify certain terms and conditions of its tariff in response to concerns raised by petitioners and FCC staff, and filing revised cost data to better conform with the FCC's rules,[19] which used DS-1 to allocate costs just as all other cost studies did until Tariff Transmittal No. 38, the FCC "found no compelling argument has been

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[16] *See AT&T v. Iowa Network Services, Inc.*, Aureon Reply Brief at 2 (citing Exhibit 77, Second Supplemental Declaration of Frank Hilton ¶ 2), Docket No. 17-56, Bureau ID No. EB-17-MD-001 (filed Aug. 28, 2017) ("*AT&T v. INS*").

[17] *Id.* at 3 (citing Second Supp. Hilton Decl. ¶ 2).

[18] *In re Iowa Network Access Division Tariff F.C.C. No. 1, Transmittal Nos. 1, 6, and 10*, Order, 4 FCC Rcd. 3947 ¶ 4 (1989)

[19] *Id.*, ¶ 9.

presented that the tariff filed by [Aureon] is patently unlawful so as to require rejection or that the tariff warrants investigation at this time."[20] It was not until the issuance of the *Tariff Investigation Order* that the FCC ruled that Aureon must change its methodology, and base its cost allocations on DS-3 rather than DS-1 circuits.

AT&T asserts that the circuit inventory relied upon by Aureon for its current and past filings are unreliable because such information was allegedly flawed. AT&T has demonstrated a consistent and disingenuous practice of making factual and legal assertions that are patently false, or that are taken out of context to give a different meaning than the one originally intended.[21] AT&T has taken Aureon's statement regarding its circuit inventory out of context to give the deceptive impression that Aureon's line counts are inaccurate.

Aureon's outside consultant, Mr. Paul Nesenson, explained that the difference between the inventory filed in Transmittal No. 38 from that in Transmittal No. 36 was due to the fact that when the inventory for Transmittal No. 36 was performed, the old inventory system did not produce circuit IDs to physically confirm their presence.[22] Specifically, the inventory in

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[20] *Id.* at 3947-48, ¶ 9.

[21] For example, AT&T alleges that Aureon has never claimed that CEA Transport Service, i.e., the lease provided by the Network Division to the Access Division, existed until the Direct Case. AT&T Opp. at 32-33. That is demonstrably false. In the Complaint proceeding, Aureon stated that "the Access Division leases capacity of the entire [Network Division] fiber network, whereas individual DS-3 circuit leases are discrete capacity arrangements that have a different cost structure than capacity leases between the Aureon divisions." *AT&T v. INS*, Aureon Legal Analysis at 50 (filed June 28, 2017). Aureon later stated that "There are no readily available rates for comparable service to develop a fair market value rate because the [Network Division] does not provide service to third parties to access the more than 2,700 mile CEA fiber network. *The Access Division is the only customer for that service. Id.*, AT&T Initial Brief at 9 (filed Aug. 21, 2017) (emphasis added).

[22] Aureon Direct Case at 36-37. AT&T discounts Mr. Nesenson's declaration because he is not an engineer by training, and does not assert that he has any prior experience or expertise with respect to backbone fiber networks or SONET or Ethernet technology. AT&T Opp. at 47. Mr. Nesenson is well qualified to perform Aureon's circuit inventory. Specifically, he has over 12 years of experience in performing circuit inventories for many different carriers. Circuit

Transmittal No. 36 was based on a then-current count of circuits and transport rings and applicable ring mileage with a focus on circuit counts used for terminating CEA calls (i.e., from Aureon to a subtending LEC's end office).[23] The reporting tools used to identify circuit and transport ring information were only designed to capture current information.[24] Capturing current information was applicable and accurate for that particular filing.[25] Circuit IDs and their relationship to parent circuits (such as DS-1s assigned to DS-3s) were not required as part of that process.[26]

When Aureon performed its circuit inventory for Transmittal No. 38, a new set of reporting tools were used to respond to the FCC's new information request.[27] Those new reporting tools still captured in-service/current circuit and transport ring information, but also provided circuit IDs and their hierarchical relationship to other circuit IDs.[28] Aureon provided the FCC with its complete circuit inventory, which identified CEA circuits as well as non-CEA circuits.[29] Because Aureon's tariff compliance filing needed to provide new information that had not been previously requested, additional circuits that transport CEA calls between Aureon's

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inventories require experience in analyzing circuit counts, network structure, and circuit hierarchy, and not trained engineering. Mr. Nesenson has ample knowledge regarding the summarizing of large amounts of data that this process required. *See* Supplemental Declaration of Paul Nesenson ¶ 2, attached hereto as Exhibit C ("Supp. Nesenson Decl.").

[23] Supplemental Declaration of Pat Vaughan ¶ 17, attached hereto as Exhibit A ("Supp. Vaughan Decl."); *see also* Supp. Nesenson Decl. ¶ 3.

[24] Supp. Vaughan Decl. ¶ 17.

[25] *Id.*

[26] *Id.*

[27] *Id.* ¶ 18.

[28] *Id.*

[29] *Id.*

tandem switches were included.[30] The circuit count in the past filing also differs from the previous count due to network changes and customer requests.[31] It is important to note that intermachine circuits, which are DS-1 circuits between Aureon's tandems in Des Moines and Kamrar, were excluded from Aureon's prior tariff filings because the CEA circuit counts for those submissions only reported circuits from Aureon to the POIs for the LEC end offices to complete CEA calls.[32] The intermachine circuits do not connect to a POI or a LEC end office.[33] However, the intermachine circuits do carry CEA calls between the two tandems.[34] The FCC directed Aureon to report "all" circuits, and the intermachine circuits were correctly counted as CEA rather than non-CEA circuits, which accounted for an additional 227 CEA DS-1 circuits not previously included in the scope of the CEA circuit count.[35]

Mr. Nesenson's statement that the circuit count difference between Transmittal Nos. 38 and 36 was found to be due to an "inaccurate" inventory system is correct, but not because the actual circuit inventory counts were inaccurate.[36] Rather, the information pulled under the old system in response to the FCC's inquiry regarding the differences between Transmittals Nos. 38 and 36 was inaccurate in that the old reporting tools could not reproduce historical information due to the limitations of the prior system.[37] Aureon's past and current circuit data used in its cost

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* ¶ 19.

[37] *Id.*

studies are accurate, and there is no merit to AT&T's allegation that Aureon used incorrect line count information in any of its tariff cost studies.[38]

2. Aureon's Circuit Projections are Reasonable and were Adequately Explained in the Direct Case[39]

At the FCC's direction,[40] Aureon completed a projection of the circuits it used in the allocation of central office transmission equipment and cable and wire facilities.[41] While AT&T complains that Aureon did not sufficiently explain its projections, Aureon noted in its Direct Case that its estimates for both CEA circuit decline and non-CEA circuit growth were "minimal."[42] Furthermore, Aureon explained that it made conservative projections because, contrary to AT&T's assertions, circuit deployment is somewhat inelastic as a function of minutes of use. Thus, for example, "[d]espite the fact that most rural LECs have lost a very large percentage of access lines (and perhaps an even greater percentage of interstate long distance minutes of use, those LECs have not seen any material changes to the number of message toll circuits created for their interconnection with AT&T, or other Regional Bell Operating Companies (" RBOCs") and IXCs."[43] Therefore, absent significant network reconfiguration or realignment, Aureon reasonably made conservative projections regarding its future circuit use based on its experience and JSI's experience.

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[38] *Id.*

[39] Supp. Sullivan Decl. ¶¶ 2-3.

[40] *Designation Order* ¶ 24.

[41] Direct Case at 42-44.

[42] *Id.* at 43.

[43] *Id.* at 43-44.

That said, Aureon further supplements its Direct Case response to add that continued year over year decreases in CEA minutes of use will not result in any material removal of circuits.[44] While AT&T may prefer a projection showing a significant CEA circuit reduction, there are no temporary circuits contained in Aureon's current inventory that would lead to significant imminent changes and, as noted above, continued year over year decreases in CEA minutes will not cause the elimination of a significant number of CEA circuits.[45] One caveat to Aureon's conservative approach is technological change.[46] Pending FCC proceedings could drastically change how Aureon provides its CEA service in the future.[47] However, at this point, those changes are speculative and impossible to quantify.[48] Therefore, Aureon's conservative approach best reflects the realities of the changing CEA landscape.[49]

B. Replacement Cost is the Best Methodology to Determine the Fair Market Value of Aureon's Lease in this Proceeding.

AT&T speculates that Aureon's replacement cost methodology used to determine the fair market value of the lease rate may have been submitted due to alleged flaws in Aureon's other valuation methods.[50] Like so many of AT&T's other assertions, AT&T ignores facts that are contrary or inconvenient to its position. The FCC *invited* Aureon to file an alternative calculation of the fair market value lease rate, and in response, Aureon filed its fair market

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[44] Supp. Sullivan Decl. ¶ 3.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] AT&T Opp. at 41.

valuation based on the replacement cost of the CEA transport network.[51] AT&T's arguments that Aureon's replacement cost analysis is flawed fails for several reasons.

First, AT&T disingenuously asserts that Aureon acknowledged "serious flaws" in its replacement cost calculations because **[[BEGIN CONFIDENTIAL]]**

[[END CONFIDENTIAL]] As Aureon explained, and AT&T ignores, **[[BEGIN CONFIDENTIAL]]**

[[END CONFIDENTIAL]]

Second, AT&T's assertion that Aureon's cost estimate does not take economies of scale into consideration also misses the mark. **[[BEGIN CONFIDENTIAL]]**

[[END CONFIDENTIAL]] which takes into account the economies of scale that AT&T incorrectly claims is missing from Aureon's showing. Aureon's replacement cost method is overly conservative, and is a better indicator of the fair market value of the lease rate than other methodologies in light of the paucity of information for services comparable to CEA Transport Service.

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[51] *Designation Order* at 8.

[52] Direct Case at 18.

[53] Direct Case, Vaughan Decl. ¶¶ 10 & 13.

Third, with regard to the data used in Aureon's replacement cost analysis, AT&T's argument that such information is "immediately suspect" because it was not provided in the Complaint case is a non sequitur.[54] The replacement cost of the entire network to determine the fair market value of Aureon's lease rate was not at issue in that proceeding. Due to time constraints, Aureon was only able to provide partial information regarding Aureon's replacement cost estimate in its Direct Case. The remaining information is now discussed below.

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Fourth, with regard to the allocation percentages Aureon applied in its replacement cost analysis, AT&T misconstrues them as they were not composite allocations. AT&T's comments regarding Aureon's "Replacement Cost" market analysis are misplaced and misleading.[57] It appears that AT&T did not actually review the revenue requirement development based on replacement cost calculations.[58] **[[BEGIN CONFIDENTIAL]]**

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[54] AT&T Opp. at 42.

[55] *See generally*, Declaration of Pat Vaughan, attached to Aureon's Direct Case as Exhibit C.

[56] *See* Supp. Vaughan Decl. ¶¶ 2-8.

[57] Supp. Sullivan Decl. ¶ 5.

[58] *Id.*

[59] *Id.*

[60] *See* Direct Case, Exhibit B, Sullivan Decl. at 18. AT&T also argues that Aureon's treatment of its 85 GigE and 10G Ethernet rings as two non-CEA rings significantly inflates its COE and C&WF. AT&T Opp. at 66-67. With regard to the allocations of COE and CWF, as described in its response to the *Designation Order*, Aureon completed those allocations in accordance with the principles in Part 64 of the FCC's rules of directly assigning costs where possible and allocating costs based on relative use measurements where necessary. Accordingly, those allocations are reasonable and correct. *See* Supp. Sullivan Decl. ¶ 4.

[61] Supp. Sullivan Decl. ¶ 6.

[62] *Id.*

[63] *Id.*

[64] *Id.* ¶ 7 (*see* AT&T Opp. at 42).

[65] *Id.*

[66] *Id.*

[67] *Id.* ¶ 8 (*see* AT&T Opp. at 42-43).

[[END CONFIDENTIAL]]

[68] *Id.*

[69] *Id.*

[70] *Id.* ¶ 9.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

C. Other Fair Market Value Issues

1. There is no Prevailing Price for the Network Division Lease Rate to the Access Division.

a. AT&T Cannot Establish a Prevailing Price on a Service-Line Basis Because That is Prohibited by the FCC's Rules.

When the Commission adopted its prevailing price rule for affiliate transactions, it explicitly and deliberately limited the prevailing price comparison to like products or services.[75] Relying on MCI's comments, the Commission sought to limit the product-by-product or service-by-service comparisons used to determine the prevailing price as much as possible.[76] Specifically, if the test had compared service lines, a basket of services, or a line of business, there could be "no assurance that the prevailing company price of any particular product in the basket accurately reflects the market price."[77]

AT&T agrees that the Commission must use a service-by-service evaluation to determine the prevailing price, if one can be determined, of the CEA Transport Service[78] provided by the Network Division to the Access Division,[79] but AT&T gives mere lip service to the service-by-

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[75] *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order 11 FCC Rcd 17539, 17600-01, ¶ 136 (1996) ("*Accounting Safeguards Order*").

[76] *Id.*; *see also Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, MCI Comments, CC Docket No. 96-150 at 24 (Filed Aug. 26, 1996) ("MCI Comments").

[77] MCI Comments at 24.

[78] Aureon explained that the term "CEA Transport Service" refers to a service provided by the Network Division that enables the Access Division to access all 2,700 miles of the CEA network to route calls to all of the LECs that subtend Aureon's CEA network. Direct Case at 8. This does not refer to a defined term in Aureon's tariff as AT&T suggests is required. AT&T Opp. at 32-33. CEA Transport Service would not be contained in Aureon's CEA tariff because it is a service provided by Aureon's nonregulated division – the Network Division – and not the Access Division. Aureon Tariff F.C.C. No. 1 only contains regulated services provided by the Access Division.

[79] AT&T Opp. at 38.

service requirement. First, AT&T assumes that Aureon's CEA transport service is a DS-3 fiber transport service comparable to any other DS-3 fiber transport service Aureon offers to a third party, and indistinguishable from the CEA Transport Service the Network Division provides to the Access Division.[80] However, as Aureon explained in its Direct Case, the CEA Transport Service provided to the Access Division is significantly different from other DS-3 fiber transport services offered to third parties.[81] Among other things, third-party DS-3 transport services do not provide access to all 2,700 miles of fiber to connect to all the subtending LECs,[82] and take into account other factors, such as whether the point-to-point service is on-net or off-net, protected or unprotected service, or on routes that have different cost or capacity considerations.[83]

Second, AT&T's premise of using an average of third party DS-3 lease rates to determine Aureon's lease rate for the entire CEA network is fundamentally flawed. **[[BEGIN CONFIDENTIAL**

[[END CONFIDENTIAL]]

[80] *Id.* at n.47.

[81] Direct Case at 8-9.

[82] *See* Vaughan Decl. ¶ 20.

[83] Direct Case at 9.

[84] *See* Vaughan Decl. ¶ 20.

AT&T's argument is nonsense. AT&T's argument is akin to third parties buying pieces of a car on an individual basis, such as a door, engine, steering wheel, tires, etc., and then using the average price of each of those components to calculate the average price of the entire car. Like the car analogy, if AT&T were to properly use the DS-3 third party lease rates, to the extent that they are even relevant in determining Aureon's lease rate, which they are not, AT&T would aggregate the rates in order to cobble together access to the entire network, rather than average them.[85]

Third, AT&T does not dispute that the DS-3 transport service provided by Aureon to third parties are affected by other considerations, and AT&T merely assumes that Aureon's CEA Transport Service is comparable on a service-by-service basis with other DS-3 fiber transport services Aureon offers. AT&T offers no basis for the Commission to ignore the distinctions between the CEA Transport Service provided by the Network Division to the Access Division, and the DS-3 circuits provided to third parties. Although AT&T argues that the FCC's *Alpine* decision demonstrates that the factors that differentiate third party DS-3 leases from CEA Transport Service should be ignored, that decision provides AT&T with no support.[86] *Alpine* was not about whether Aureon's third party DS-3 leases were the same as CEA Transport Service. Rather, that case was about "mileage pumping," where certain LECs had redesignated their points of interconnection ("POIs") to Des Moines, Iowa, so that those LECs could charge IXCs for additional mileage to transport the IXCs' traffic from Des Moines to the LECs' end offices.

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[85] *See also* Section II.C.1.b, *infra*, regarding the prohibited use of averaging to determine the prevailing rate.

[86] AT&T Opp. at 33 (citing *AT&T v. Alpine*, 27 FCC Rcd. 11511 (2012)).

In light of the differences between the Network Division's CEA Transport Service provided to the Access Division, and the DS-3 service provided to third parties, and AT&T's generalized and unfounded assumptions about Aureon's offerings, the Commission must recognize that Aureon's CEA Transport Service is not a mere DS-3 fiber transport service and is distinguishable from the services Aureon sells to third parties.

Fourth, AT&T's own argument undermines its claim that the various DS-3 fiber transport services Aureon provides are comparable services suitable for a prevailing price analysis. In objecting to Aureon's citation of various DS-3 lease rates to show the divergence in the DS-3 fiber transport services Auron provides, AT&T claims that any individual lease rate is not a suitable comparison for Aureon's CEA Transport Service.[87] Rather, AT&T argues "the average DS-3 rate is the more reliable comparator."[88] However, this is precisely the result the Commission sought to avoid in requiring a service-by-service comparison.

[[BEGIN CONFIDENTIAL]]

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[87] AT&T Opp. at 35.

[88] *Id.*

[89] *Id.* **[[BEGIN CONFIDENTIAL**

[[END CONFIDENTIAL]] *See* Supp. Vaughan Decl. ¶ 22.

[[END CONFIDENTIAL]] The Commission recognized and avoided these problems when it required prevailing prices to be calculated on a service-by-service basis. The Commission anticipated that letting a carrier establish a prevailing price using dissimilar services would "allow products or services for which no true prevailing price exists to be valued by a carrier at a fabricated prevailing price to the harm of ratepayers if the cost or market value of such products or services is actually different from this fabricated prevailing price."[90]

b. Even if, *Arguendo*, Third Party Leases are the Same as CEA Transport Service, AT&T Cannot Use an Average of Those Leases to Determine a Prevailing Rate.

AT&T argues that the average price across a variety of transport leases provided to third parties, with different capacities, features, and mileage, is the best way to establish Aureon's CEA Transport Service prevailing price.[91] The Commission's rules makes clear that a prevailing price is not determined through an averaging of service-line offerings as argued by AT&T. Section 32.27(c) states, in relevant part, that "[n]on-tariffed services provided between a carrier and its affiliate that qualify for prevailing price valuation, as defined in paragraph (d) of this section, shall be recorded at *the* prevailing price."[92] The prevailing price is a *single* price for a service (on a service-by-service rather than a service-line basis) offered to third parties, if more than 25% of the total quantity of that service is sold by Aureon.[93] As the Commission explained:

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[90] *Accounting Safeguards Order*, 11 FCC Rcd. at 17601, ¶ 136.

[91] AT&T Opp. at 34-35.

[92] 47 C.F.R. § 32.27(c) (emphasis added).

[93] 47 C.F.R. § 32.27(d).

"*The prevailing price* describes *the price* at which a company offers an asset or service to the general public."[94] "A non-tariffed asset or service is deemed to have a prevailing company price whenever the affiliate that provides the asset or service also provides substantial quantities of it to non-affiliates. When such *a price* exists, the rules require the carrier to record the affiliate transaction at *that price*."[95]

Even if, *arguendo*, the Network Division did provide CEA Transport Service to third parties, which it does not as no third parties have requested CEA Transport Service, and have only requested point-to-point services, the plain language of the rule does not permit the use of an average to determine the prevailing price for a service. If Section 32.27 permitted an average to be used to determine a prevailing price, the rule would have stated that services purchased from an affiliate that qualified for prevailing price valuation must be recorded "at the *average* prevailing price," rather than "at *the* prevailing price." The plain language of Section 32.27(c) and (d), and the Commission's explanations in its orders regarding prevailing price valuation make clear that the prevailing price is a single price that is offered to third parties, and not an average.

2. The Use of SDN and MIEAC CEA Rates to Determine Fair Market is Appropriate.

AT&T asserts that SDN and MIEAC's rates cannot be used as comparators for fair market valuation purposes because those carriers' rates are not available on the open market, are not for wholesale transport, and SDN and MIEAC are willing to enter into "deeply discounted

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[94] *Accounting Safeguards Order*, 12 FCC Rcd. at 17595, ¶ 126 (emphasis added).

[95] *Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions Between Carriers and Their Nonregulated Affiliates*, 8 FCC Rcd. 8071, 8077-78, ¶ 15 (1993) (emphasis added).

contractual rates to wholesale customers for traffic associated with access stimulation."[96] AT&T is wrong for several reasons.

First, as noted by AT&T, Spulber & Yoo's law review article regarding the valuation of access services states that "[b]asing access rates on the price that would be paid for access on the open market thus typically represents the best way to promote economic efficiency."[97] While open market rates may, in general, be the "best" way to determine fair market value, it is certainly not the only way. Indeed, as discussed in Section II.B., *supra*, using the replacement cost of the CEA transport network is a better methodology given that there are only two providers of CEA service from which comparable rates can be obtained. Furthermore, filed rates are, in fact, prices paid on the open market. AT&T does not dispute, nor can it, that the FCC ruled that publicly filed agreements submitted to state commissions can be used as a proxy for fair market value prices for purposes of the affiliate transaction rule.[98] AT&T also does not dispute that there is no functional difference between the rates in publicly files agreements, and rates in tariffs filed with the FCC, as the rates in both types of filings are subject to similar regulatory review.[99] AT&T's argument that publicly filed rates have no applicability for a fair market value analysis is simply wrong and contrary to the FCC's determinations in the *Accounting Safeguards Order.*

Second, AT&T's argument that SDN and MIEAC's tariff rates are not wholesale rates is irrelevant because even if, *arguendo*, the tariff rates for CEA transport service provided by SDN

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[96] AT&T Opp. at 22-23.

[97] AT&T Opp. at 24 (citing Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 Cornell L. Rev. 885, 987 (2003)).

[98] *Accounting Safeguards Order*, 11 FCC Rcd. at 17612, ¶ 158.

[99] Publicly filed agreements "will be subject to review by State regulators similar to tariff review . . . ." *Id.*

and MIEAC were not considered to be open market pricing, there are no wholesale prices publicly available that Aureon could use as comparables to determine the fair market value of Aureon's lease rate. Even if Aureon wanted to use, and the FCC required, wholesale CEA transport rates to be used for Aureon's fair market value analysis, such wholesale rates are simply not publicly available. Aureon cannot make up from whole cloth data that does not exist.

Third, there is no merit to AT&T's contention that SDN and MIEAC have "deeply discounted" wholesale rates that are available on the open market. AT&T cites to SDN's petition for declaratory ruling to allow SDN to enter into an agreement with an IXC to terminate large volumes of access stimulated traffic.[100] However, SDN withdrew its petition due to resolution of the underlying court case that led to the filing, and no rate information is available in that case.[101] That rate would not be an open market wholesale rate in any event as SDN's contract would have been in the same category as a rate contained in a publicly filed agreement, which is tantamount to a tariff rate.

Moreover, Aureon also attempted to file a similar high volume traffic contract with the FCC, called "High-Volume Traffic Contract Tariff No. 1", which was "based upon a contract that was negotiated with and voluntarily agreed to by an interexchange carrier . . . ."[102] The Commission required Aureon to defer the effective date of its proposed contract tariff for further FCC staff review,[103] and the Commission ultimately rejected the proposed contract. Instead, of permitting Aureon to offer a high-volume tariff contract, the FCC required Aureon to file a new

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[100] AT&T Opp. at 22, n.23 (citing SDN Petition for Declaratory Ruling, WC Docket No. 18-41 (filed Feb. 7, 2018)).

[101] *See Petition for Expedited Declaratory Ruling of South Dakota Network, LLC*, Order, WC Docket No. 18-41, DA 18-497 (rel. May 15, 2018).

[102] *See* Iowa Network Access Division, Transmittal No. 33 at 2 (filed Apr. 14, 2017).

[103] *See* Iowa Network Access Division, Transmittal No. 34 (filed Apr. 26, 2017).

tariffed volume discount plan with a rate of $0.00649 per minute.[104] To the extent there is a publicly available discounted rate offered by Aureon that is comparable to the "wholesale" CEA contract rate offered by SDN that AT&T alleges should be used in Aureon's fair market analysis, such a rate would be Aureon's volume discount plan rate.

Fourth, AT&T's criticisms regarding Aureon's fair market value calculations using SDN and MIEAC's tariff rates are either without merit, or addressed below. With regard to the SDN rate that should have been used by Aureon in its tariff compliance filing, those SDN rates were what was available from the FCC's ETFS system at the time Aureon was preparing its compliance filing in response to the FCC's *Tariff Investigation Order*.[105] Aureon initially utilized SDN's Switched Transport Rate, and updated that rate with the CEA rate in an effort to be more conservative (a lower rate will result in a lower comparison value).[106] AT&T cites a rate change that was not contained in the tariff that JSI obtained through ETFS.[107] However, substituting the revised lower rate of $0.004871 in the fair market value analysis results in a revised value of $12,671,323, which is 158% greater than the lease charge of $4,904,646.[108]

AT&T notes that the MIEAC comparison yields a value of $4,036,482, which is less than Aureon's lease charge.[109] This value was calculated by Aureon – as directed by the FCC – using actual originating/terminating minutes, in lieu of an assumption of a 50%

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[104] *See* Iowa Network Access Division, Transmittal No. 35 (filed May 17. 2017). Aureon's volume discount plan is higher than the CLEC benchmark rate calculated by the FCC in the *Tariff Investigation Order*, and predates the FCC's November 2017 *Referral Order*.

[105] Supplemental Declaration of Brian Sullivan ¶ 11, attached hereto as Exhibit B ("Supp. Sullivan Decl.")

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] AT&T Opp. at 24.

terminating/originating.[110] Aureon is not disputing either the result of this calculation, or the minutes of use ratio that produced it.[111] However, the MIEAC rate taken in conjunction with the other market comparisons that were made serves to validate Aureon's lease rate because Aureon did not "cherry pick" rates that were only in its favor. Rather, Mr. Sullivan used all of the data available to calculate a fair market value rate,[112] and, as discussed below in Section II.C.3, even discarded a much higher outlier rate that would have increased the fair market valuation. By selecting the lowest possible rate from SDN, updating the MIEAC computation with actual terminating/originating minutes, and augmenting the market comparisons with NECA and CenturyLink rates for both switched access and direct trunk transport, Aureon made a valid market comparison in good faith to calculate the fair market value for Aureon's lease rate.

3. The Use of NECA, and CenturyLink Rates are Also Appropriate Indicators of Fair Market Value.

AT&T argues that an average of point-to-point DS-3 transport rates should be used to determine the Network Division's lease rate to the Access Division. As previously explained, that approach is inappropriate because (1) third party DS-3s do not provide access to the entire CEA network, even taken in the aggregate, and they are only point-to-point services; (2) the FCC's prevailing price rule for affiliate transactions specifically contemplate that there will be a *single* rate offered to third parties in order for a prevailing price to be established; (3) third-party leases do not take into account other pricing factors that are not present for CEA Transport Service, such as whether the point-to-point service is on-net or off-net, protected or unprotected service, or on routes that have different cost or capacity.

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[110] Supp. Sullivan Decl. ¶ 10.

[111] *Id.*

[112] *Id.*

Nonetheless, Aureon provided the FCC with information regarding the NECA and CenturyLink rates as a point of comparison to give the FCC some reference regarding DS-3 lease rates available from other carriers. Aureon did ultimately decide not to use the NECA rate in its final analysis as that rate was significantly higher than the other comparators. It is unclear why AT&T would dispute Aureon's reasonable decision not to use the NECA rate to determine the fair market value of Aureon's lease rate as that results in lower, rather than higher, fair market valuation.

Aureon has augmented its market rate comparisons by adding NECA and CenturyLink rates for both switched access as well as direct trunk transport, the results of which all serve to validate the Aureon charge.[113] NECA's switched access rates – even at the lowest rate band – result in a value approximately twelve (12) times the Aureon lease rate.[114] As noted above, Aureon did not include this value in the development of the average comparable.[115] The NECA direct trunk transport and the CenturyLink switched access rates both result in values from $8.6 million to $8.7 million, which are substantially in excess of Aureon's lease rate. The CenturyLink direct trunk transport calculation does result in an amount slightly below ($75,687, or 2%) the Aureon lease rate, and that has been included in the average development.

Section 32.27 requires ILECs to determine the fair market value for a particular service. It does not require an ILEC to utilize the absolute lowest value obtainable, but a "fair" value.[116] In a complex service such as CEA transport, the approach of averaging the results of six market

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[113] Supp. Sullivan Decl. ¶ 12. It is important to note that Aureon does not provide direct trunk transport. *See* 47 C.F.R. § 69.112(i). Aureon provides common trunk transport.

[114] *Id.*

[115] *Id.*

[116] *Id.*

cost comparators, after removing one comparator that would otherwise greatly benefit Aureon, is a reasonable and good faith effort to calculate the fair market value of the service in question, i.e., the transport of switched access traffic between the Aureon tandem switch and individual POIs located in Iowa.[117]

AT&T also takes issue with the use of public tariff rates by Aureon in its market rate comparisons.[118] In this case, the service in question, network transport of switched access minutes, is one that is commonly tariffed.[119] In addition, the use of tariff rates, which have been reviewed and approved by the FCC, ensures that the rates used represent only the fully distributed costs of the assets that are used to provide the subject service, or represent a reasonable price for the service where tariffs are no longer filed based on revenue requirements, but are frozen or otherwise governed by FCC rules and policies.[120]

AT&T alleges that including dedicated trunk transport rates in making the fair market comparisons indicates a change in the service that is provided to the Access Division by the Network Division.[121] While direct trunk transport is not the same service provided to the Access Division, comparing regulated direct trunk transport rates and revenues is instructive in assessing the market rate for the cost of transporting switched access traffic.[122]

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[117] *Id.*

[118] AT&T Opp. at 24;

[119] Supp. Sullivan Decl. ¶ 13.

[120] *Id.*

[121] *Id.* ¶ 14.

[122] *Id.*

With respect to the choice of comparable rates taken from the CenturyLink tariff, AT&T takes issue with the applicable term plan.[123] CenturyLink provides term discounts for 12 months, 24 months, 36 months, 60 months, and 120 months, along with a monthly offering with no discount (the 120 month plan rates are identical to the 60 month plan rates).[124] AT&T asserts that Aureon "disingenuously" selected the 36-month discount for comparison purposes.[125] The selection of 36 months was done for two reasons: (1) it represents the approximate "mid-point" in the time spectrum available as well as the tariff rates, and (2) 36 months matches the required projection period detailed in Part 64 for COE and CWF demand quantities, and utilized by Aureon in its tariff compliance filing to project circuit demand levels going forward.[126] A chart showing the projected revenues for each of the term plans is shown below, with the chosen plan highlighted:

CenturyLink DS-3 Term Plans	Fixed	Mile	Revenues @ Aureon Demand
Monthly	$264.88	$32.12	$5,365,206.20
12 Mo	$257.13	$31.48	$5,251,421.23
24 Mo	$248.73	$30.19	$5,042,174.44
36 Mo	$238.39	$28.91	$4,828,968.17
60/120 Mo	$211.90	$25.70	$4,292,730.15

AT&T also repeats that the revenues from the 36 month plan are "less than the filed lease expense" but once again neglects to mention that the difference represents a very small amount

[123] AT&T Opp. at 41.

[124] Supp. Sullivan Decl. ¶ 15.

[125] *Id.*

[126] *Id.*

of $75,678.[127] As the rate for the 36 month plan was only one of the rates used to calculate the average for the fair market comparison, the $75,678 differential had no material impact on the overall average of all the rates analyzed.[128]

The service that Aureon obtains from its Network Division is use of a fiber optic network to transport switched access voice traffic throughout the network, including termination at multiple POIs, and delivery to the central tandem switch.[129] A reasonable comparison for this service can be found in FCC approved tariff rates from relatively similarly situated entities.[130] In order to be conservative, Aureon discarded one comparison using NECA switched transport rates that resulted in an amount approximately twelve (12) times the Aureon lease rate.[131] The result of the remaining comparisons show that Aureon's lease charge remains substantially below the fair market rate for this service.[132]

D. The Additional Switch Investment is "Used and Useful" in the Provision of CEA Service, and its Inclusion in the Calculation of Aureon's CEA Rate is Reasonable.

Contrary to AT&T's contentions, it is entirely proper for Aureon to include the costs of its anticipated switch replacement project costs in its cost studies. "[T]he concept 'used and useful' denotes property necessary to the efficient conduct of a utility's business, presently or within *a reasonable future period.*"[133] As the Commission acknowledged in the *Tariff*

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[127] *Id.* ¶ 16.

[128] *Id.*

[129] *Id.* ¶ 17.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *In re: American Tel. and Tel. Co.*, Phase II Final Decision and Order, 64 F.C.C.2d 1, 47 ¶ 111 (1977) ("*AT&T Phase II Order*") (emphasis added).

Investigation Order, investments in equipment do "not have to be immediate and can include, for example, a portion of equipment that is serving as a reserve for future use."[134]

In this case, the switch project is certainly "used and useful" because the equipment will replace Aureon's old and outdated switch from *1988* that has limited support, and for which replacement hardware is no longer being made. The new switch is necessary for the continued operation of the CEA network, and Aureon has recently acquired a new site in which to house the switch and related equipment,[135] which demonstrates that the switch will be put into use within a "reasonable future period." Specific information regarding the investments to be made in Aureon's new central office switching equipment is set forth in Mr. Vaugan's supplemental declaration.[136]

E. The Circuit Counts Provided by Aureon are Reasonable and "Used and Useful".

As discussed above, Aureon's circuit counts are reasonable because they have been validated by Aureon's outside consultant in conjunction with the creation of a new inventory system that will enable Aureon to produce a complete and ongoing circuit inventory for current and future tariff filings. As previously explained in the Direct Case, all circuits that are showing as being used for CEA service are, in fact, being used to provide CEA service.[137] AT&T, however, would have the FCC include an efficiency requirement that is not present in the "used and useful" standard.

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[134] *Designation Order* at 4, n.27 (citations omitted). The Commission can, and has, taken equitable considerations into account in the "used and useful" decision-making process to permit the allowance of investment. *Id.*

[135] Supp. Vaughan Decl. ¶ 10.

[136] *Id.* ¶¶ 10-15.

[137] Direct Case at 49.

In attempting to rebut Mr. Sullivan's declaration that Aureon uses its circuits shown as being used for CEA service for CEA service, AT&T badly misconstrues the Commission's "used and useful" standard. "[T]he concept 'used and useful' denotes property necessary to the efficient conduct of a utility's business, presently or within a reasonable future period."[138] While the standard does require a carrier to conduct its business efficiently as a general matter, AT&T would have the FCC inquire as to whether the use of each piece of equipment "could be provided more efficiently".[139] That is not a requirement or the purposes of the "used and useful" standard.

As discussed previously, property is considered "used and useful" for regulatory ratemaking purposes if it is "necessary to the efficient conduct of a utility's business, presently or within a reasonable future period."[140] Furthermore, the purpose of the "used and useful" standard is to ensure a monopoly utility is fairly compensated for the investment of its private property.[141] Thus, the used and useful standard attempts to approximate the valuation (plus working capital, overhead costs, intangibles, and going concern value) of a provider's plant and equipment used to serve the public.[142] The standard does not dictate whether each part of a

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[138] *AT&T Phase II Order*, 64 F.C.C.2d at 47 ¶ 111.

[139] AT&T Opp. at 63.

[140] *AT&T Phase II Order* 64 F.C.C. 2d at 47 ¶ 111.

[141] *Id.* ("The idea of basing utility rates on the value of the assets used and useful is rooted in American legal theory and particularly in the constitutional limitations on the taking of private property for public use." (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1877); *Stone v. Farmers' Loan and Trust Co.*, 116 U.S. 307 (1866))); *see also In re: AT&T Application for Review; Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 31 FCC Rcd. 12977, 12981 ¶ 10 ("Relevant consideration under the used and useful standard [include] the need to compensate the investor for capital devoted to serving ratepayers…").

[142] *AT&T Phase II Order*, 64 F.C.C.2d at 46 ¶ 111.

carrier's plant or equipment is the most efficient possible use of the carrier's property, as argued by AT&T.

Both sound policy and Commission precedent make clear that the used and useful standard does not require the FCC to micromanage a regulated carrier's investment decisions, deployment strategy, or network architecture. Use of a carrier's plant and equipment to provide service is a primary consideration in the used and useful standard. "As a threshold matter, plant currently used for the provision of regulated services generally is recognized to be 'used and useful.'"[143] The standard does not allow the Commission to second guess whether the carrier could use each individual component of its plant and equipment more efficiently.

Commission precedent also makes clear that a carrier should be fully compensated for the use of its property to provide service to the public.[144] For example, in the Sandwich Isle Communications ("Sandwich Isle") proceeding, the Commission applied the used and useful standard to an undersea cable project in Hawaii. In that case, FCC allowed Sandwich Isle to include a significantly higher cost for the lease based on additional equitable considerations beyond the mere use of the cable to provide service.[145] The Sandwich Isle proceeding illustrates a two pronged test for the used and useful standard. First, if cost can be attributed to plant or equipment that is being used to provide service, that plant or equipment is used and useful. Second, for costs attributable to plant or equipment not currently in use, which is not at issue

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[143] *In re Sandwich Isle Communications, Inc.*, Order, 25 FCC Rcd. 13647, 13652 ¶ 13(WCB 2010) ("*Sandwich Isle Order*").

[144] *Id.* at 47 ¶ 111 ("The idea of basing utility rates on the value of the assets used and useful is rooted in American legal theory and particularly in the constitutional limitations on the taking of private property for public use.") (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1877); *Stone v. Farmers' Loan and Trust Co.*, 116 U.S. 307 (1866)).

[145] *Id.* at 13662-63 ¶ 29.

with regard to Aureon's circuits because they are, in fact, being used for CEA service, such amounts can still be included in the regulated carrier's rate base.

As Mr. Sullivan's declaration makes clear, Aureon uses the circuits it identified as CEA circuits for CEA service. Therefore, because the circuits are used to provide Aureon's regulated service, the circuits are used and useful for purposes of determining Aureon's CEA rate base. Sound policy also supports the inclusion of **[[BEGIN CONFIDENTIAL]]**

[[END CONFIDENTIAL]]. AT&T effectively asks the Commission to adopt a used and useful standard that acts as a permanent *post hoc* review of any regulated carrier's network deployment. In other words, when AT&T asks whether an Aureon ring can be combined or why some DS-3 circuits have too few DS-1 circuits for AT&T's liking, AT&T is asking the Commission to second guess each investment and deployment decision Aureon has ever made. Such an interpretation of the used and useful standard would chill investment by regulated carriers because no carrier could ever have enough information about future demand growth and network needs to be sure that today's investment could not be accomplished more efficiently tomorrow.

For example, if a regulated carrier wants to deploy new plant or equipment today, that deployment must satisfy the used and useful standard, meaning the new deployment must either be for immediate use, or for use within the reasonably foreseeable future. As a result, a carrier's network may look, with the benefit of hindsight, somewhat piecemeal in its deployment. Where knowledge of demand years in the future may have allowed a carrier to build and design a more efficient network in many cases, a carrier is limited to building and designing its network based on how the newly deployed plant and equipment will be used at the time of deployment or relatively shortly thereafter. The FCC has wisely decided to protect a carrier's investments as

long as an investment is currently used, or will be used in the reasonably foreseeable future, to provide the carrier's regulated service.

Because Aureon uses the circuits it designated as being used in CEA service for CEA service, those circuits are used and useful. The Commission should not allow AT&T to pervert the used and useful standard. As FCC precedent and common sense make clear, plant or equipment that are used for the provision of service are used and useful. With hindsight, AT&T or the Commission may be able to design a more efficient network than a carrier can as its network develops, but such a theoretical exercise is beyond the Commission's authority, would undermine the used and useful standard, would discourage investment, and allow the Commission to effectively take a carrier's private investment without compensation.

III. CONCLUSION

Wherefore, for the foregoing reasons, and for the reasons set forth in Aureon's Direct Case, the FCC should find that Aureon's tariff rate is lawful, that its good faith fair market value estimates are reasonable, and that its cost study, as updated herein, fully supports Aureon's filed rate. To the extent that the FCC decides to regulate Aureon as an ILEC rather than a CLEC, and chooses to not rely on replacement cost to determine fair market value, the Commission should grant Aureon's waiver of the requirement to comply with the fair market value showing requirement in Section 32.27(c).

Respectfully submitted,

/s/ James U. Troup
James U. Troup
Tony S. Lee
Fletcher, Heald & Hildreth, PLC
1300 N. 17th Street, Suite 1100
Arlington, VA 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
troup@fhhlaw.com
lee@fhhlaw.com

Counsel for Iowa Network Access Division d/b/a Aureon Network Services

Dated: December 12, 2018

PUBLIC VERSION

EXHIBIT A

Supplemental Declaration of Pat Vaughan

This entire exhibit is confidential, and has been removed from the public version of this document.

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EXHIBIT B

Supplemental Declaration of Brian Sullivan

This entire exhibit is confidential, and has been removed from the public version of this document.

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EXHIBIT C

Supplemental Declaration of Paul Nesenson

This entire exhibit is confidential, and has been removed from the public version of this document.

PUBLIC VERSION

CERTIFICATE OF SERVICE

I, Tony S. Lee, hereby certify that on this 12th day of December 2018, copies of the foregoing document were sent to the following:

Joseph Price
Pamela Arluk
Joel Rabinovitz
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
Via E-mail and Hand Delivery

Keith C. Buell
Director, Government Affairs
Sprint Communications Company L.P.
900 Seventh Street N.W
Suite 700
Washington, DC 20001
Keith.Buell@sprint.com
Via Email

James F. Bendernagel, Jr.
Michael J. Hunseder
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
jbendernagel@sidley.com
mhunseder@sidley.com
Via Email

Curtis L. Groves
Associate General Counsel
Federal Regulatory and Legal Affairs
Verizon
1300 I Street, N.W., Suite 500 East
Washington, DC 20005
curtis.groves@verizon.com
Via Email

Steven A. Fredley
Amy E. Richardson
Harris, Wiltshire & Grannis LLP
1919 M Street, N.W.
8th Floor
Washington, DC 20036
SFredley@hwglaw.com
arichardson@hwglaw.com
Via Email

/s/ Tony S. Lee
Tony S. Lee